

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HUSSEIN J. HIRSI, Deceased
Claimant

VS.

TYSON FRESH MEATS, INC.
Self-Insured Respondent

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Docket No. **1,033,552**

ORDER

Claimant's surviving spouse requested review of the March 6, 2009 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on July 8, 2009.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found Hussein J. Hirsi's accidental death did not arise out of and in the course of employment. The ALJ further found Hirsi's death was a natural consequence of his tuberculosis.

The surviving spouse requests review of whether Hirsi's death was due to an accident that arose out of and in the course of employment. The surviving spouse argues Hirsi's tuberculosis was a preexisting disease and a cow kick he allegedly received on the date of his death aggravated his tuberculosis and contributed to his death.

Respondent requests the Board to affirm the ALJ's determination that the surviving spouse failed to sustain her burden of proof that Hirsi's death was caused by accidental injury arising out of and in the course of his employment with respondent. In addition,

respondent argues the ALJ erred in finding a valid marriage between Hirsi and his alleged wife.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Briefly stated, on January 4, 2007, Hirsi went to work where he was a "can hanger" on the slaughter line for respondent. After the cow was killed, his job required him to hang a can on the neck of the cow after the cow's throat had been slit. He was performing that job when a co-worker observed him bent over and spitting blood. The co-worker never saw or heard anything happen to Hirsi but just observed him in distress and bent over. When the co-worker asked what had happened Hirsi did not respond. The co-worker summoned help to take Hirsi to the infirmary.

Hirsi was assisted to the infirmary where he sat upon an examination table and continued to spit blood into a wastebasket being held in front of him. An interpreter allegedly told the nurse in the infirmary that Hirsi stated "I think I was kicked by a cow."¹ Another report simply noted Hirsi was kicked. At about the same time Hirsi passed out, emergency medical technicians arrived and took over care of Hirsi by suctioning his airway. The emergency personnel transported Hirsi to the hospital and attempts to revive him were unsuccessful.

Dr. Robert E. Warrick was the emergency room's treating physician at the time when Mr. Hirsi arrived by ambulance at Newman Memorial Hospital.

Q. Can you describe for what, if anything, you observed when Mr. Hirsi was brought into the ER on that date?

A. His pupils were dilated and fixed. There had been no respiration for a fairly extensive period of time and CPR was in progress and he was asystolic when we put him on the monitor and had been for some time, according to the EMS crew.

¹ Stout Depo., Ex. 8.

And they had been unable to get any air to pass into his lungs because of the extensive amount of blood that was in his mouth and throat. Their suction machine would not handle all of it.²

Dr. Warrick testified that Hirsi was deceased upon arrival at the hospital. The EMT crew advised the doctor that Hirsi had been kicked in the chest by a cow at respondent's plant. The doctor further testified that there was no evidence that Hirsi' lungs had collapsed.

Dr. Warrick testified:

Q. Okay. Have you received any further information that would cause you to question the findings that you made on or about January 4th, 2007, that are contained within that report?

A. Well, the autopsy report showed that he had TB.

Q. All right.

A. Tuberculosis.

Q. And did you see any evidence of your examination from him at that time that would lead you to believe that that would have affected the findings that you made at that time?

A. Tuberculosis could affect the findings of him dying because of the kick to the chest by the cow, yes, that's possible.

Q. And in what way, sir?

A. Tuberculosis can bleed.

Q. All right. And would someone have more or less likelihood of bleeding if they have tuberculosis when they get kicked in the chest?

A. I can't answer that. I don't know.

Q. All right.

² Warrick Depo. at 6-7.

A. I can tell you that there is a potential for tuberculosis causing bleeding. As to whether or not it could be initiated by trauma, it would be an assumption on my part.³

Dr. Warrick opined that claimant's death was caused by asphyxiation due to a blood clot which obscured the trachea.

On January 5, 2007, Dr. Erik K. Mitchell, board certified in anatomic and clinical pathology, performed an autopsy on Hirsi and found he had hemorrhaged into a tuberculous cavity with blood in the airway due to cavitary tuberculosis.

Dr. Mitchell testified:

Q. All right. You mentioned that the individual had cavitary tuberculosis. Is the tuberculosis that you found, was it confined to the lungs?

A. Yes.

Q. Okay, and was it confined to one lung or was it present in both lungs?

A. It was probably present in both lungs, if I remember correctly, but the cavitation I think was only in one. Let me double-check. Yeah, there's involvement of both lungs, but the cavitation was only on the right.

Q. Now, in the situation where a person has tuberculosis do you have an opinion as to whether that would make them predisposed to have any ruptures of any blood vessels within the lungs?

A. It depends upon the degree of development of the disease process. His disease process was sufficiently -- had evolved sufficiently that the risk of rupture was a constant issue.

Q. And would trauma to the chest be a precipitating or causative factor in causing a hemorrhage?

A. It's one of the potential causes of initiation of the hemorrhage.⁴

Active tuberculosis in the lungs will cause a person to develop a productive cough. As the disease progresses unchecked, the blood vessels will erode in the lungs and then

³ *Id.* at 17-18.

⁴ Mitchell Depo. at 14-15.

eventually cause a hemorrhage. The hemorrhage can be accelerated due to trauma in the cavitation that might not have occurred otherwise. Dr. Mitchell opined that the trauma that was described had been and probably was a causative factor by history in Hirsi's death.

Q. And do you believe that it's more likely than not that the blow to his chest accelerated, aggravated or intensified the pre-existing tuberculosis?

Mr. Worth: Objection, assumes facts not in evidence.

A. Using the information available, given to me at the time of our investigation, it appears that an impact, the exact nature of which I cannot define, immediately preceded onset of symptoms. Given that temporal relationship and the anatomically demonstrable disease, in my opinion, there is in fact a relationship between the onset of that hemorrhage and the impact.

Q. Would you then agree that it was, according to history, and subject to your objection, Mr. Worth, do you believe that this would have been a substantial causative factor in the ultimate hemorrhage that he, he had.

A. Yes.⁵

On cross-examination, Dr. Mitchell testified that the natural progression of tuberculosis is where a vessel can rupture at any time. He further opined that Hirsi's right lung had a vessel that ruptured which ultimately lead to his demise. As far as objective findings consistent with trauma to Hirsi's chest, the doctor did not find any verification of that trauma upon his examination. The trauma information was provided to him through a historical report.

Q. If you had not had that history of trauma in the case of Mr. Hirsi, would your findings on examination and autopsy have led you to conclude that he died as a natural progression of his tuberculosis?

A. Yes.⁶

Dr. Thomas Beller, board certified in internal medicine and pulmonology, testified:

Q. From your review of this information what is your understanding of the cause of Mr. Hirsi's death?

⁵ *Id.* at 32-33.

⁶ *Id.* at 48-49.

A. My feeling -- my opinion was that he died from massive hemoptysis or bleeding from his lungs that was caused by pulmonary tuberculosis.

Q. You used the word there hemoptysis with which I'm not sure we are all familiar.

A. Hemoptysis refers to coughing blood.

Q. Did the autopsy allow you to confirm that he, in fact, had active tuberculosis at the time of his death?

A. Yes, it did show tuberculosis and I believe that cultures that were taken from the lungs grew out to microbacterium tuberculosis.

Q. What is the natural progression of tuberculosis in the lungs if not properly treated?

A. Well, it has a variable progression, but if it's untreated, it certainly may continue to progress and lead to respiratory insufficiency, potentially respiratory failure, it can also result in complications as in this case where a cavity in the lungs erodes into a blood vessel and causes bleeding.⁷

Dr. Beller opined that individuals who have active tuberculosis will typically have a cough, shortness of breath, weakness, fatigue, low grade fever, chills, night sweats and poor appetite. The doctor further opined that Hirsi's hemoptysis could have certainly resulted from tuberculosis without any type of precipitating trauma. Dr. Beller reviewed all of the medical records and did not find any objective evidence that Hirsi suffered a blunt force trauma to his chest since there was no bruising of the chest wall, fractured ribs, hemothorax, collapsed lung or pericardial tamponade.

The surviving spouse argues that the evidence established that Hirsi's death was caused by a kick that aggravated the preexisting tuberculosis and led to the bleeding. The ALJ reviewed the evidentiary record and concluded that the surviving spouse failed to meet her burden of proof to establish that Hirsi suffered accidental injury arising out of and in the course of his employment.

It is undisputed that Hirsi had an active case of tuberculosis on the date of his death. It is further significant to note that before he reported to work on the date of his death, Hirsi first went to the Flint Hills Community Health Center with complaints of a cough, chest congestion, a poor appetite and nausea. Dr. Beller testified that individuals who have active tuberculosis will typically have a cough, shortness of breath, weakness, fatigue, low grade fever, chills, night sweats and poor appetite.

⁷ Beller Depo. at 12-13.

Hirsi never told the respondent's infirmary staff that he had been kicked. Moreover, the only evidence that Hirsi was kicked was in the form of hearsay allegedly from an interpreter, Mr. Jama, who never testified in this matter. And in the confusion attendant treating Hirsi in respondent's infirmary it was reported that Hirsi allegedly stated to an interpreter, Mr. Jama, either that he thought he had been kicked or was kicked. Absent that history, which was thereafter repeated in the medical records, even the doctor who performed the autopsy agreed that he would have concluded Hirsi died as a natural consequence of his active tuberculosis.

Dr. Mitchell noted that the natural progression of tuberculosis is where a vessel can rupture at any time. He further opined that Hirsi's right lung had a vessel that ruptured which ultimately lead to his demise. As far as objective findings consistent with trauma to Hirsi's chest, the doctor did not find any verification of that trauma upon his examination. The trauma information was provided to him through a historical report. Dr. Mitchell testified:

Q. If you had not had that history of trauma in the case of Mr. Hirsi, would your findings on examination and autopsy have led you to conclude that he died as a natural progression of his tuberculosis?

A. Yes.⁸

Likewise, Dr. Beller reviewed all of the medical records and did not find any objective evidence that Hirsi suffered a blunt force trauma to his chest since there was no bruising of the chest wall, fractured ribs, hemothorax, collapsed lung or pericardial tamponade. Nor did the autopsy photographs provide evidence of blunt force trauma to Hirsi's chest. The Board agrees the surviving spouse failed to meet her burden of proof and the preponderance of the objective evidence does not indicate that Hirsi suffered a trauma to his chest. Consequently, the Board affirms the ALJ's Award in all respects.

It should be noted that the Board adopts the ALJ's findings that Miiris Abudllahi is the surviving legal spouse. The District Court's Order is res judicata.⁹

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 6, 2009, is affirmed.

⁸ Mitchell Depo. at 48-49.

⁹ R.H. Trans., Ex. 1.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge